No. 10082

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GERMAIN SEED AND PLANT COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order issued against respondent pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Supp. V, Title 29, Sec. 151, *et seq.*). The jurisdiction of this Court is based upon Section 10 (e) of the Act. Respondent is a California corporation having its principal place of business in Los Angeles, California, and other establishments in various cities within California. The unfair labor practices occurred at respondent's warehouse and re-

tail store in Los Angeles, California, and its retail store and nursery in Van Nuys, California.

STATEMENT OF THE CASE

Upon proceedings had pursuant to Section 10 of the Act,[1] the Board, on December 31, 1941, issued its findings of fact, conclusions of law, and order (R. 132–167, 37 N. L. R. B. 1090), which may be briefly summarized as follows:

1. *Nature of respondent's business.*—Respondent, a California corporation, with its principal office and place of business in Los Angeles, California, is engaged in the growing, refining, purchasing, and selling of seeds, bulbs, plants, and nursery stock, and in the purchase and sale of insecticides, poultry, and garden supplies and remedies, hardware, and other similar products. It maintains commercial establishments in various cities within California. In 1940, about 17 percent of respondent's purchases, valued at approximately $900,000, originated outside the State of California; about 24 percent of the products sold, amounting to approximately $1,500,000, were shipped to points outside the State of California.

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[1] These included: Charge and amended charge filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 595, A. F. L., herein called the Union (R. 1–8); complaint (R. 8–14); motions to strike portions of complaint, to dismiss complaint, and for bill of particulars (R. 15–21); answer of respondent (R. 21–24); hearing before a Trial Examiner; brief of respondent; Intermediate Report of Trial Examiner (R. 25–56); and exceptions thereto by respondent (R. 57–131).

Purchases for the Los Angeles warehouse amounted to approximately $719,860 in 1940, of which about 40 percent were shipped to the warehouse from out-of-State points; about 25 percent of the warehouse sales in 1940, amounting to approximately $873,968, necessitated shipments out of State. Purchases made for the Los Angeles retail store in 1940 amounted to $88,739, of which about 5 percent were received from out of State; about 2 percent of the retail store sales in 1940, amounting to $158,393.50, necessitated shipments to points outside the State of California. Approximately 90 percent of the business of the Van Nuys retail store and nursery is handled through the Los Angeles warehouse (R. 136–138).

2. *The unfair labor practices.*—Respondent dominated and interfered with the formation and administration of Consolidated Seedmen's Union, Inc., herein called the Consolidated, and contributed support to it, and by these and other specified acts, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby violating Section 8 (1) and (2) of the Act (R. 138–165).[2]

3. *The Board's order.*—The Board ordered respondent to cease and desist from the unfair labor practices found, to withdraw all recognition from and completely to disestablish the Consolidated as the collective bar-

[2] The relevant portions of the Act are printed in the Appendix, *infra*, pp. 25–26.

gaining representative of its employees, and to post appropriate notices (R. 165–167).

SUMMARY OF ARGUMENT

I. The National Labor Relations Act is applicable to respondent.

II. The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act.

III. The Board's order is valid and proper under the Act.

ARGUMENT

Point I

The National Labor Relations Act is applicable to respondent

Upon the facts set forth above (*supra,* pp. 2–3), which were stipulated by the parties (R. 56a–56d, 179–182), the applicability of the Act to respondent's operations is clear. *National Labor Relations Board* v. *Jones & Laughlin Steel Co.,* 301 U. S. 1, and companion cases; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453; *Virginia Electric and Power Company* v. *National Labor Relations Board,* 115 F. (2d) 414 (C. C. A. 4), approved in this respect, 314 U. S. 469; *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board,* 109 F. (2d) 76 (C. C. A. 9), cert. denied, 310 U. S. 632, 724; *National Labor Relations Board* v. *Schmidt Baking Co.,* 122 F. (2d) 162 (C. C. A. 4).

Point II

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged in and is engaging in unfair labor practices within the meaning of section 8 (1) and (2) of the Act

A. Formation of the Consolidated

Commencing about August 1937, the American Federation of Labor undertook organization of respondent's employees (R. 143; R. 256, 302).[3] When several employees, including Supervisors Vivian Nesbit and Daniel Hatfield,[4] discussed the activities of the union organizers with Purchasing Agent Walter P. Sage and expressed their desire to have a union of some kind, Sage suggested that "perhaps [they] would like to have a little independent union of [their] own" (R. 144, 145; R. 185, 186, 192), and put his suggestion into effect by calling a meeting of employees to "discuss the thing further" (R. 144; R. 187). The meeting was held in respondent's warehouse after working hours and was attended by 15 to 20 employees, including Sage, Dwight Gates, manager of the warehouse and mill room (R. 143; R. 190), Woolcott Hill, manager of the shipping department (R. 143; R. 189), and Supervisors Nesbit, Hatfield, Allen Hook, and Kenneth Luck (R. 142–144; R. 188–190, 302, 303). Sage, who pre-

[3] References preceding the semicolons are to the findings of fact made in the Board's decision.

[4] We discuss below the Company's responsibility for the activities of its supervisory employees (*infra*, pp. 18–21).

sided, was the only speaker (R. 144; R. 192). He impressed upon the employees the fact that respondent would prefer a "house" union to an "outside" union, and warned them not to do anything which might jeopardize their jobs (R. 145, 146; R. 303, 304, 391, 392, 421). He then renewed his earlier proposal to form an "independent" union (R. 144, 145; R. 192). When the employees present agreed, he advanced the name of J. P. Voorhees as the "legal man to do that for [them]" (R. 145; R. 206).[5]

About 2 weeks later, Sage furthered the project thus launched by calling another meeting in respondent's warehouse, at which he introduced Voorhees, whom he had invited to attend (R. 146; R. 194, 195, 210). Voorhees spoke in favor of "independent" as against "outside" unions, and advised incorporation of the organization to be formed (R. 146; R. 211). He also stated that employees who had the right to hire, fire, or discipline, or were in executive positions, "did not have the right to belong to any union," and dismissed Managers Hill and Gates from the meeting when in-

[5] The suggestion of specified legal counsel is a device frequently used by employers to control incipient organizations among their employees. See, *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 867, 868 (C. C. A. 2), cert. denied 304 U. S. 576; *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. (2d) 713, 718 (C. C. A. 3); *National Labor Relations Board* v. *J. Freezer & Son, Inc.*, 95 F. (2d) 840, 841 (C. C. A. 4); *National Labor Relations Board* v. *Ed Friedrich, Inc.*, 116 F. (2d) 888, 890 (C. C. A. 5); *National Labor Relations Board* v. *Falk Corp.*, 102 F. (2d) 383, 387 (C. C. A. 7), aff'd 308 U. S. 453.

formed of the nature of their respective duties (R. 146; R. 196, 197, 211). Sage, however, who was an executive (*infra,* pp. 18–19), was permitted to remain (R. 146; R. 197, 400, 401).[6] Supervisors Nesbit, Hatfield, Hook, and Luck also remained throughout the meeting (R. 146; R. 197).

Pursuant to a suggestion made at the meeting described above, an election was held in which the employees were given a choice between the C. I. O., the A. F. of L., an "independent" union, or having "Mr. Meyberg [respondent's president] talk to us" (R. 146, 147; R. 283, 297, 309, 312). The election was held in the plant during working hours (R. 146; R. 310, 313, 394, 423, 545). Supervisory employees assisted in arranging the details of, and conducting, the balloting (R. 147; R. 284, 296, 297, 310, 313, 394, 423); the ballots were thereafter counted in respondent's warehouse by a committee which included Supervisors Nesbit and W. S. Clark (R. 147; R. 285, 287).[7] Of 102 ballots cast, 45 were for an "independent" union (R. 147; R. 287).[8]

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[6] Sage did not withdraw from the movement to form an "independent" union until, as noted below, the Consolidated had been incorporated (*infra*, p. 9).

[7] Clark was in charge of the nursery (R. 142; R. 256, 372, 373). He was included among management representatives invited by the Consolidated to attend a dinner meeting on May 2, 1939 (R. 142; R. 567, 568).

[8] Efforts of an employer to counteract or mold employee desires by the device of a company sponsored election have been regularly condemned as violative of the Act. *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, 62 S. Ct. 608, reversing 116 F. (2d) 350, 351 (C. C. A. 7) and enforcing 13 N. L. R. B. 338; *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 785–786 (C. C. A. 9), cert. denied 312 U. S. 678; *Titan Metal Mfg. Co.* v. *National Labor*

Although the election failed to show a majority for their proposal, the sponsors of an "inside" union continued their organizational activities. A "pre-organizational" committee composed of seven employees of various departments, including Supervisors Clark, Luck, Hook, and Harold Frauenberger, and Dorothy Turton, private secretary to W. J. Schoenfeld, respondent's vice president (R. 148; R. 373, 409), circulated petitions, on or about September 1, 1937, designating themselves as "a committee to formulate an independent union" and to represent the employees for the purpose of collective bargaining (R. 148; R. 216, 445, 446). These activities were carried on in the warehouse during working hours (R. 148; R. 315, 445). Example was set for the employees when the petitions were signed by Purchasing Agent Sage, Dorothy Turton, Supervisors Clark, Nesbit, Hatfield, Hook, Frauenberger, and Luck, O. E. Johnson, assistant manager of the Los Angeles retail store, and Stanley Williams, assistant to respondent's secretary treasurer (R. 148–149; R. 216–217, 373).

On September 9, 1937, the "pre-organizational" committee met and executed articles incorporating Con-

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Relations Board, 106 F. (2d) 254, 260 (C. C. A. 3), cert. denied 308 U. S. 615; *National Labor Relations Board* v. *Crystal Spring Finishing Co.*, 116 F. (2d) 669, 672 (C. C. A. 1); *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 65–66 (C. C. A. 2), aff'd 309 U. S. 629; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 870 (C. C. A. 2), cert. denied 304 U. S. 576; *National Labor Relations Board* v. *New Era Die Co.*, 118 F. (2d) 500, 503, 504 (C. C. A. 3); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 181, 182 (C. C. A. 6); *National Labor Relations Board* v. *Christian Board of Publication*, 113 F. (2d) 678, 680, 682 (C. C. A. 8).

solidated Seedmen's Union, Inc. (R. 149; R. 446–448). Thereafter the incorporators, a majority of whom, as we have noted, were supervisors (*supra,* p. 8), became the Consolidated's first Board of Directors (R. 149; R. 218, 219).[9]

Shortly after the Consolidated was incorporated, a meeting of employees was held at the Los Angeles retail store at which several employees questioned the right of Purchasing Agent Sage to belong to the Consolidated in view of his supervisory or executive position; as Voorhees testified, "since they felt he was in that position * * * that he had no right in the meeting whatsoever," Sage was asked to leave (R. 149; R. 212, 213). With the Consolidated entrenched and his purpose accomplished, Sage withdrew (R. 198–200).

On October 1, 1937, respondent, on the basis of the "pre-organization" petitions (*supra,* p. 8) and membership applications, recognized the Consolidated as the exclusive representative of its employees at the Los Angeles and Van Nuys establishments (R. 151; R. 458–460). Thereafter, most of the supervisory employees and other representatives of management who had been instrumental in the formation of the Consolidated continued to play an active role in its administration. Frauenberger was its president from September 1937

[9] The Articles of Incorporation of the Consolidated designated Clark, Hook, Turton, Frauenberger, and Luck as five of the seven Directors (R. 218–219). At the first meeting of the Board of Directors, on September 20, 1937, Clark, Hook, and Turton resigned (R. 223). They were replaced by Supervisor Hatfield and two others (R. 223). Hook and Turton continued to play active parts in the Consolidated (*infra*, pp. 9–10).

to April 1938; Luck from April 1938 to April 1939; and Hook occupied that office at the time of the hearing before the Board in April 1941. Turton was secretary until she left respondent's employ in June 1938, and Violet Ashley, who succeeded Turton as private secretary to respondent's vice-president (R. 409), served as secretary of the Consolidated until November 1938. The directors since the beginning of 1938 have included, at various times, Supervisors Luck, Hook, Hatfield, Nesbit, and Frauenberger (R. 150; R. 263).

B. Bargaining activities of the Consolidated

During the years which followed respondent's recognition of the Consolidated in 1937, the complacence and subservience of the bargaining agency which it forced upon its employees were amply demonstrated. After securing from respondent, shortly after recognition, some concessions including wage increases, the officials of the Consolidated, as we shall show, consistently refused over a period of more than two years to present to respondent for consideration urgent employee demands for further wage increases. At no time did they request the execution of a written contract embodying those concessions which respondent did make.

After recognition by respondent on October 1, 1937 (*supra,* p. 9), the Consolidated sent to Meyberg, respondent's president, a list of 20 "suggestions" regarding working conditions (R. 152; R. 325–327, 462, 463). Respondent granted most of these and granted also raises varying from 5 to 18 percent (R. 150; R. 325–330, 467, 470–476). No effort was made by the Consolidated to secure an agreement embodying any of

these terms (R. 153; R. 657). Although, on October 14, the Consolidated informed respondent that it had been authorized by the employees to "proceed with making definite agreements," nothing further was done to secure a binding commitment from the management (R. 152, 153; R. 657). The concessions granted thus continued to rest on respondent's sufferance. When, in August 1940, an employee proposed at a Consolidated meeting that an attempt be made to obtain a signed agreement, the president stated simply that "we could not get it" (R. 153, n. 12; R. 359).

Despite the raises granted in 1937, dissatisfaction with the wage scale continued. The officers of the Consolidated, however, refused to concern themselves with the situation. In February 1938, a petition was presented to the Consolidated on behalf of a group of employees calling for, among other things, $100 per month as a minimum wage for common labor (R. 153; R. 522, 523). The Board of Directors of the Consolidated declined to take action on this request (R. 153; R. 524, 525). Again on August 20, 1940, Eric Hulphers, a member of the Consolidated, demanded action on the petition (R. 153; R. 358). Nothing was done, and members of the Consolidated were told by their representatives that "it was absolutely impossible to get a raise" (R. 154; R. 640, 641).

The bankruptcy of the Consolidated having been demonstrated, a number of the employees decided to take matters into their own hands.[10] In the first week

[10] The minutes of the Consolidated meeting held on August 20, 1940, at which action on wage increases had been demanded, show that "The men said they are willing to give this Union a chance. If they couldn't produce the desired conditions the men would join another union" (R. 358).

of September 1940, Employees Hulphers, Loy, and R. H. Montgomery approached President Meyberg and informed him that they had not been able to obtain satisfaction through the Consolidated, that there was unrest among the employees, and that they wished to consult him before taking any further steps (R. 154; R. 333, 334, 630–632). Meyberg suggested that the employees meet with him later that day and asked that, in the meantime, the men prepare a petition embodying their demands (R. 154; R. 334, 335, 632). The meeting with Meyberg was held and two petitions for wage increases were presented (R. 154, 155; R. 350, 351, 357, 600, 601, 638). Neither of the petitions had been authorized by the Consolidated; the move for wage increases was supported alike by members and nonmembers of that organization (R. 155; R. 334, 350, 361, 642), which, as we have noted, had refused to act in the matter (*supra*, p. 11).

At the meeting with Meyberg, Hulphers reiterated the substance of what had been told Meyberg earlier in the day and added that the employees were "now taking steps to join outside unions" (R. 155; R. 335, 336).[11] Meyberg then invited the male employees to have dinner with him at a later date, at which time the matter could be further discussed (R. 155; R. 337, 633).

On September 17, Meyberg met with the men at the plant after having taken them to dinner (R. 155; R. 338,

[11] The day before the meeting with Meyberg, several employees had signed applications for membership in the Union (R. 154; R. 332, 333).

339, 633). Both members and non-members of the Consolidated were present (R. 155; R. 349, 361). Meyberg, although recognizing that the Consolidated had not presented any demands for wage increases, told the men that whatever concessions he granted would be handled through the Consolidated (R. 156; R. 341, 342, 636). He also asserted that they were "one happy family," and suggested that before the employees "do anything, before [they] call the doctor in," they ought to give him "a chance to do something." His diagnosis concluded with "Maybe you have got the wrong ailment. Maybe you won't need the doctor" (R. 155, 156; R. 342, 636). It is clear, as the Board found, that by the "doctor" Meyberg meant the Union (R. 156; R. 342).

Meyberg at once proceeded to supply his own prescription for the virus with which his employees appeared to be afflicted. On October 3, 1940, he granted wage raises and, in keeping with his announced intention (*supra*), apprised the employees of his action by notices sent to the Consolidated (R. 156; R. 590–592, 648, 649, 661, 662). That organization was thereby given the credit for a substantial benefit which it had refused to seek itself, on the ground that wage raises were "impossible" (*supra,* p. 11). Thus, respondent, using the frequently condemned device of "tying in," gave the Consolidated vital support by concealing its inherent ineffectiveness with a camouflage of activity. *Western Union Telegraph Co.* v. *National Labor Relations Board,* 113 F. (2d) 992, 995 (C. C. A. 2); *National Labor Relations Board* v. *Falk Corporation,* 102 F.

(2d) 383, 388 (C. C. A. 7), aff'd 308 U. S. 453, 460, 461; *National Labor Relations Board* v. *American Potash & Chemical Corp.,* 98 F. (2d) 488, 494 (C. C. A. 9), cert. denied 306 U. S. 643; *Titan Metal Mfg. Co.* v. *National Labor Relations Board,* 106 F. (2d) 254, 259 (C. C. A. 3), cert. denied 308 U. S. 615; *National Labor Relations Board* v. *Christian Board of Publication,* 113 F. (2d) 678, 683 (C. C. A. 8).

C. Respondent's financial and other support of the Consolidated

We have seen that respondent freely lent its facilities to the organizers of the Consolidated during its formative stages. Thus the first meetings called by Sage were held on Compauy premises (*supra,* pp. 5–6), the election was conducted in the plant during working hours (*supra,* p. 7), and the petitions calling for the formation of "an independent union" were circulated also during working hours (*supra,* p. 8). This type of Company support continued after the Consolidated was recognized. The testimony of numerous witnesses shows that the Consolidated solicited members and customarily collected dues during working hours on respondent's premises (R. 158, 159; R. 323–325, 396, 397, 424–426, 606, 607, 620, 621, 629); that notices of meetings were regularly posted over the time clocks in various divisions (R. 159; R. 267, 288, 397, 407, 410); that the secretary of the Consolidated frequently advised the Board of Directors of meetings by use of respondent's telephone during working hours (R. 159; R. 410); and that, on occasion, the Board of Directors of the Consolidated held meetings in the warehouse (R. 159; R. 292, 520). These activities in the plant were

open and notorious; the Board was clearly justified in finding, as it did, that they had "the tacit consent" of respondent (R. 159).

In May 1938, when the Consolidated held a picnic, Meyberg granted it the use of respondent's truck, contributed $10 toward the picnic, and paid a fine incurred by the driver of the truck (R. 158; R. 265, 562–564, 652, 653). The Consolidated responded with a letter thanking respondent for its "very generous financial aid and support" (R. 158; R. 564, 565). In July 1938, respondent again lent its truck to the Consolidated for a social function (R. 158; R. 565, 566, 567), and in October 1938 gave it the use of the shipping floor in the warehouse for a dance (R. 158; R. 558).

It requires no citation of authority to demonstrate the illegality of the material support thus afforded the Consolidated by respondent.

D. Respondent's manifestation of preference for the Consolidated over the Union

The record affirmatively establishes that in conferring the many favors upon the Consolidated which are described above, respondent was prompted by a preference for that organization over the Union. Meyberg made respondent's position in this respect clear when in May 1939 he was asked by Hook whether he, Hook, would be laid off if he did not pay dues to the Consolidated. Meyberg advised him "to keep harmony in the firm, it is better to join the union [Consolidated], the fifty cents a month doesn't break you * * * it is best to join, to keep paying your dues" (R. 157; R. 504, 505). On the other hand, when Manager Hill learned

that employee Jack Thrift belonged to the Union (R. 157; R. 608), he urged Thrift to withdraw and stated that "all these unions are a bunch of leeches. They feed off the efforts of others. You belong to the C. S. U. [the Consolidated] as well, they are taking care of you whereas the dues you are paying into the A. F. of L. is doing you no good. We don't want the A. F. of L. in here or any other union" (R. 157, 158; R. 608, 609). These "intimations of preference" were clearly illegal, *International Ass'n of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 78.

Respondent also announced its position to its employees generally in a more formal manner. As the employees were leaving one of the organizational meetings held early in the campaign for the formation of the Consolidated (*supra,* pp. 5–6), they were handed a "Statement of Facts," signed by Meyberg (R. 149; R. 258). The statement asserted, *inter alia,* that the employees "do not have to join any labor union" or "pay dues, levies, nor [sic] any kind of tribute to any organization or group to hold your job." It added that respondent's operations were carried on "in a spirit of friendly acquaintanceship," that "there are no inaccessible 'bosses,' " that "everyone knows everyone else," and that "we like to feel that we work with, not against, each other" (R. 149–151; R. 259, 260). The Board concluded that through this statement, delivered at a time when certain "accessible bosses" were busily engaged in organizing an "independent" union, respondent made amply clear to its employees that it would not look with favor upon their affiliation with an "outside" union

(R. 161). When viewed in this setting, the Board's conclusion, "based upon a complex of activities" (*National Labor Relations Board* v. *Virginia Electric & Power Co.,* 314 U. S. 469, 477), that the distribution of the "Statement of Facts" constituted a violation of the Act, was clearly proper. *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 78; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 588–590; *National Labor Relations Board* v. *Pacific Gas and Electric Company,* 118 F. (2d) 780, 788 (C. C. A. 9); *National Labor Relations Board* v. *Sunshine Mining Co.,* 110 F. (2d) 780, 786 (C. C. A. 9), cert. denied 312 U. S. 678; *National Labor Relations Board* v. *Chicago Apparatus Company,* 116 F. (2d) 753, 756, 757 (C. C. A. 7); *National Labor Relations Board* v. *New Era Die Co.,* 118 F. (2d) 500, 505 (C. C. A. 3).

E. Conclusion as to respondent's violation of Section 8 (1) and 8 (2)

The failure of the Consolidated to act as a bona fide representative of its members when the occasion demanded (*supra,* pp. 10–11), respondent's attempt to conceal that failure by giving the Consolidated credit for raises which it had refused to seek (*supra,* p. 13), respondent's grant to that organization of extensive financial and other support (*supra,* pp. 14–15), and its contemporaneous expressions of hostility to the Union (*supra,* pp. 5–6, 15–17), expose the illegality of respondent's domination, control, and support of the union which it formed. In addition, the record clearly shows that the Consolidated was conceived, formed, supported,

and controlled by persons for whose activities respondent bears full responsibility.

Respondent does not question the supervisory status of Managers Hill and Gates, who attended and lent their prestige to the first two organizational meetings called by Sage (*supra*, pp. 5–7). Similarly it is not denied that Clark, who was in charge of respondent's Van Nuys nursery (*supra*, p. 7, n. 7), was in a position of authority. Clark was a member of the committee which organized and incorporated the Consolidated; he subscribed, and took an active part in securing the signatures of employees, to the petition authorizing that committee to act (*supra*, pp. 8–9).

Sage, who organized the movement to form an "independent" union and who played a dominant role in that movement, remaining active until the Consolidated was incorporated (*supra*, pp. 5–9), was likewise a representative of management. Respondent's contention to the contrary is without merit. Sage had been employed by respondent for 22 years; he had served 12 years as traffic manager and superintendent of the Los Angeles warehouse, and in 1937 was purchasing agent for the "sundries department" of the warehouse (R. 139; R. 183–185). He was included in the group of officials and top management representatives who attended respondent's weekly meetings of "department managers" (R. 139; R. 667). There can be no doubt that the employees had "just cause to believe" that he was "acting for and on behalf of the management." *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80. That they did in fact so believe is

shown by their demand, after the Consolidated was incorporated, that he refrain from further participation in the affairs of that organization (*supra,* p. 9).

Although Hill, Gates, Sage, and Clark withdrew, at various stages, from the group sponsoring an independent union, they had already clothed that movement with prestige by acts which respondent never later repudiated. It is clear that the Consolidated came into existence under "conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 588. Furthermore, the aura of company approval and support, once established, was maintained after the withdrawal of these highly placed officials by the continued activity of a large group of lesser supervisors and others, "emulating the example set by the management." [12] The Board's finding that this activity is attributable to respondent is unassailable.

As we have seen, Nesbit, Hatfield, Hook, Luck, and Frauenberger actively participated in the formation of the Consolidated and, after it had been firmly established, continued to play an active part in its administration (*supra,* pp. 5, 7–10). The record establishes that they exercised general authority over the employees. Nesbit was in charge of and directed the work

[12] *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 81.

and controlled by persons for whose activities respondent bears full responsibility.

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Sage, who organized the movement to form an "independent" union and who played a dominant role in that movement, remaining active until the Consolidated was incorporated (*supra,* pp. 5–9), was likewise a representative of management. Respondent's contention to the contrary is without merit. Sage had been employed by respondent for 22 years; he had served 12 years as traffic manager and superintendent of the Los Angeles warehouse, and in 1937 was purchasing agent for the "sundries department" of the warehouse (R. 139; R. 183–185). He was included in the group of officials and top management representatives who attended respondent's weekly meetings of "department managers" (R. 139; R. 667). There can be no doubt that the employees had "just cause to believe" that he was "acting for and on behalf of the management." *International Ass'n of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 80. That they did in fact so believe is

shown by their demand, after the Consolidated was incorporated, that he refrain from further participation in the affairs of that organization (*supra,* p. 9).

Although Hill, Gates, Sage, and Clark withdrew, at various stages, from the group sponsoring an independent union, they had already clothed that movement with prestige by acts which respondent never later repudiated. It is clear that the Consolidated came into existence under "conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 588. Furthermore, the aura of company approval and support, once established, was maintained after the withdrawal of these highly placed officials by the continued activity of a large group of lesser supervisors and others, "emulating the example set by the management." [12] The Board's finding that this activity is attributable to respondent is unassailable.

As we have seen, Nesbit, Hatfield, Hook, Luck, and Frauenberger actively participated in the formation of the Consolidated and, after it had been firmly established, continued to play an active part in its administration (*supra,* pp. 5, 7–10). The record establishes that they exercised general authority over the employees. Nesbit was in charge of and directed the work

[12] *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 81.

of the other employees on the fourth floor of the warehouse; his immediate superiors were Managers Hill and Gates (R. 139, 140; R. 272, 273, 388–390, 628). Hatfield directed the work of one or more helpers and had authority to direct other employees to work for him when occasion demanded; he was responsible for the proper filling of seed orders (R. 141; R. 509–511). Hook operated the mill on the sixth floor of the warehouse and his duties also required him to relay the orders of Manager Gates to the employees on the sixth floor as well as to the "bull gang," to assign work, to be responsible for its proper performance, and to guide and instruct the men (R. 141; R. 478, 479, 484, 486). Luck was the head of the bulb department and inspected the work of the three or four employees who worked under him during the busy season which normally covered 7½ months during the year (R. 140; R. 540, 577, 583, 585). Luck also had authority to recommend persons for hire and discharge (R. 140, 141; R. 577). Frauenberger was in charge of city shipping (R. 139; R. 651). He was charged with the duty of relaying Manager Hill's orders to the truck drivers, assigning and directing work, helping load the trucks, checking out the loads, and attending to complaints concerning deliveries (R. 139; R. 383–385, 432–433).

On these facts, the test of employer responsibility is fully met. The subforemen described above were "in a strategic position to translate to their subordinates the policies and desires of the management." *International Ass'n of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 80. See also *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584,

599; *H. J. Heinz* v. *National Labor Relations Board,* 311 U. S. 514, 520, 521; *National Labor Relations Board* v. *Pacific Gas and Electric Co.,* 118 F. (2d) 780, 786–788 (C. C. A. 9).

Respondent is likewise accountable for the activities of Turton, strategically placed as secretary of the Consolidated (*supra,* p. 10). The Board's finding that "as private secretary of the respondent's vice president, Turton * * * occupied a confidential position which allied her closely with the respondent, and gave employees just cause to believe that she represented the management" (R. 148, n. 8) is clearly justified. *International Ass'n of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 80; *National Labor Relations Board* v. *American Mfg. Co.,* 106 F. (2d) 61, 68 (C. C. A. 2), aff'd 309 U. S. 629. The same considerations apply to the dual activities of Ashley, Turton's successor in both of her positions (*supra,* p. 10).

On all of the foregoing facts, the Board's conclusion that respondent illegally dominated, interfered with, and supported the Consolidated in violation of Section 8 (2) of the Act, is amply supported.

By dominating, interfering with, and supporting the Consolidated, respondent violated Section 8 (1) as well as Section 8 (2) of the Act.[13] In addition, President Meyberg's advice to an employee to retain his mem-

[13] *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267, 268; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 231; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 251, 252.

bership in the Consolidated (*supra,* p. 15), Manager Hill's disparagement of the Union (*supra,* pp. 15–16), respondent's issuance of the "Statement of Facts" under the circumstances disclosed (*supra,* pp. 16–17), and its act of crediting the Consolidated with a wage increase in the face of the employees' threatened adherence to an "outside" union (*supra,* pp. 11–13), all constituted separate violations of Section 8 (1). The Board's findings to this effect (R. 163) are plainly warranted. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261; *International Ass'n of Machinists* v. *National Labor Relations Board,* 311 U. S. 72; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584; *National Labor Relations Board* v. *Sunshine Mining Co.,* 110 F. (2d) 780 (C. C. A. 9), cert. denied, 312 U. S. 678; *National Labor Relations Board* v. *Pacific Gas and Electric Co.,* 118 F. (2d) 780 (C. C. A. 9); *Ritzwoller Co.* v. *National Labor Relations Board,* 114 F. (2d) 432 (C. C. A. 7).

Point III

The Board's order is valid and proper under the Act

The cease-and-desist provisions of the Board's order are mandatory under Section 10 (c) of the Act. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 265. The Supreme Court's decision in *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426, requires no modification of paragraph 1 (c) of the order, which

directs respondent to cease and desist from "in any other manner" interfering with the exercise by its employees of the rights guaranteed in Section 7 of the Act. The respondent's separate and distinct violations of Section 8 (1) (*supra,* pp. 21–22) as well as its wholesale violation of Section 8 (2), establish the propriety of the general injunctive order under the principles laid down in the *Express Publishing* case, as construed in subsequent decisions of this and other Courts. *National Labor Relations Board* v. *Pacific Gas and Electric Co.,* 118 F. (2d) 780, 789–791 (C. C. A. 9); *Oughton* v. *National Labor Relations Board,* sur settlement of decree, April 4, 1941, 8 L. R. R. 209 (C. C. A. 3); *National Labor Relations Board* v. *Stehli & Co.,* 125 F. (2d) 705 (C. C. A. 3), enforcing 35 N. L. R. B., No. 12; *Wilson & Co.* v. *National Labor Relations Board,* 126 F. (2d) 114, 117 (C. C. A. 7), enforcing 31 N. L. R. B., No. 69; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.,* 118 F. (2d) 874, 890–891 (C. C. A. 1), cert. denied 313 U. S. 595; *American Enka Corp.* v. *National Labor Relations Board,* 119 F. (2d) 60, 63 (C. C. A. 4). Since the decision in the *Express* case, the Supreme Court has repeatedly enforced general cease and desist orders. *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.,* 62 S. Ct. 608, enforcing 13 N. L. R. B. 338, 362; *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.,* 62 S. Ct. 846, enforcing 18 N. L. R. B. 591, 640; *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board,* 312 U. S. 660, enforcing in this respect 18 N. L. R. B. 300, 319; *Phelps*

Dodge Corp. v. *National Labor Relations Board,* 313 U. S. 177, enforcing in this respect 19 N. L. R. B. 547, 603.

The propriety of the requirement that respondent withdraw recognition from and disestablish the Consolidated and post appropriate notices (R. 166–167), is well established.

CONCLUSION

It is respectfully submitted that the National Labor Relations Act is applicable to respondent, that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that a decree should issue enforcing the order in full as prayed in the Board's petition.

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APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V., Sec. 151 *et seq.*) are as follows.

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the right's guaranteed in Section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *.
>
> * * * * *
>
> SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *
>
> * * * * *
>
> (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including

reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *
* * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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